



DEFENSE LOGISTICS AGENCY
HEADQUARTERS
8725 JOHN J. KINGMAN ROAD, SUITE 2533
FORT BELVOIR, VIRGINIA 22060-6221

AUG - 9 2001

IN REPLY
REFER TO 5-33

PROCLTR 01- 14

MEMORANDUM FOR PROCLTR DISTRIBUTION LIST

SUBJECT: Conducting Market Research (DLAD 10.001, 12.208, 12.301, 12.302, 15.408)

This PROCLTR is intended to clarify and streamline the market research process. Our goal is to address concerns our buying activities have identified to us and to help DLA buying activities comply with FAR requirements in the most efficient, effective manner possible.

New DLAD guidance at 10.001(a)(2) clarifies market research requirements and the term "appropriate to the circumstances." The guidance also addresses the application of specific market research methods that can be used to facilitate determinations of commerciality.

DLAD 10.001(a)(3)(iv) provides guidance to correct noncompliances identified by the Comptroller General. In response to a protest, GAO found that the Agency failed to conduct adequate market research to support its determination that a clause was consistent with customary commercial practice; and failed to obtain a waiver, pursuant to FAR 12.302(c), to tailor standard FAR Part 12 terms and conditions in a manner inconsistent with customary commercial practice. Smelkinson Sysco Food Services, B-281631, March 15, 1999, 99-1 CPD 57. This guidance also clarifies the term "customary commercial practice," and how to apply an incremental approach to the process of conducting market research of solicitation terms and conditions.

Guidance at DLAD 12.301(e) and 12.302(c)(90) reminds contracting officers that when buying commercial items, they must use their authority to tailor the standard FAR ~~Part~~ 12 terms and conditions as necessary to ~~meet~~ the Government's needs. The guidance provides examples of terms and conditions that may require tailoring. To relieve buying activities from processing repetitive local waivers, the DLAD provides blanket authority at 12.301(f) for use of specified terms and conditions in commercial acquisitions, when applicable.

This PROCLTR is effective immediately and remains in effect until it is incorporated into DLAD 4105.1. The point of contact for this PROCLTR is Mrs. Anne Burleigh, J-336, (703) 767-1358, DSN 427-1358 or email anne_burleigh@hq.dla.mil.

WILLIAM J. KENNY
Executive Director
Logistics Policy and Acquisition Management

Attachment



* * * * *

PART 10

MARKET RESEARCH

* * * * *

10.001 Policy.

(a)(2)(iii) • • •

(a)(2)(iii)(90) *Buying activities do not have to refer every solicitation over the simplified acquisition threshold for a full technical evaluation. Buying activities should use an incremental approach to market research, depending on what is most appropriate under the circumstances (see 10.001(a)(2)). Alternative, less extensive forms of market research could include, for example, contacting the manufacturer, contacting the technician, contacting some other source, or letting Numbered Note 26 in the synopsis notice serve as the market research (see 5.207(e)(4)).*

(a)(2)(90) *The Comptroller General has stated that the specific market research techniques listed and factors to be considered (see FAR 10.002(b)(1)) reflect that the purpose of market research is to "generate a meaningful exchange of information between the agency and industry." Market research "appropriate to the circumstances" means the extent of market research that is appropriate, depending on such factors as urgency, estimated dollar value, complexity, and past experience. The FAR does not specify what circumstances agencies must consider. Buying activities should prioritize market research efforts based on anticipated benefits and cost effectiveness. Factors that buying activities may consider include, for example, problems with customer wait time and/or pricing, dollar value, volume, and the likelihood that the item or service is commercial. If market research was recently conducted and the information is still current, buying activities need not conduct additional market research; or can update previously collected market research information. (See 90.1601.)*

(91) *If an individual technical review is performed, the results will take precedence over the results of a review conducted on a group basis; this is because an individual review is a more thorough analysis, specific to the particular item or service. However, when determining if the Government's requirement can be satisfied by a commercial item, researching an item or service on an individual basis is not always required. Buying activities should use the methods described at 10.001(a)(2)(91)(A)-(C) to determine commerciality on a group basis whenever it is impracticable to conduct individual reviews, such as when adequate resources are not available or when a large number of items or services will be included on a solicitation. Buying activities should conduct commerciality reviews on a group basis whenever possible, to accelerate the pace at which items and services can be identified as commercial. Buying activities must ensure that the results of its market research efforts are entered into the Contracting Technical Data File (see DLAD 10.002(e)(90)). The contracting officer retains the authority to make the final determination of commerciality (see DLAD 12.102(90)(1)(ii)).*

(A) Logical Item Groupings. *Whenever possible, buying activities should identify logical groupings of items or services that can reasonably be presumed to be "commercial," or "noncommercial," and that can be identified in an automated system. Buying activities can then code those entire groups of items or services in the system, without conducting an individual technical review of each one. When there are items or services that are known to be an exception to the larger group, the buying activity can identify those and code them as a subgroup after coding the larger group; or code them individually on an exception basis as individual acquisitions arise. Examples of groupings of items that could logically be presumed to be commercial are:*

(1) *Items or services that use Industry Standards (ASTM, SAE, etc.) as the sole procurement document;*

(2) *Items described by Commercial Item Descriptions (CIDs);*

(3) *Items with Acquisition Method Suffix Code (AMSC) "Z," which includes commercial, nondevelopmental, and off-the-shelf items (see DFARS Appendix E, Part 2, Breakout Coding), if the contracting activity buys virtually all nondevelopmental items (such as DLA);*

(4) *Federal Stock Classes (FSCs) that can reasonably be presumed to be commercial in their entirety.*

(B) Sampling. *Acquiring large populations of items on a single contract makes it impracticable to conduct a technical review of each individual item to determine whether it meets the commercial item definition. As an alternative, buying activities can identify a sample of*

items that is representative of the requirement and only conduct a technical review of each of the items in the sample. When selecting a sample, buying activities should consider factors including, for example, the current stock position of the items in the sample, what percentage of the total estimated demand and the total estimated contract dollar value is represented by the sample, and the results of the individual technical reviews (e.g., what percentage of the items in the sample were determined to be commercial). Buying activities should generally combine sampling techniques with other market research methods and use sampling to verify other market research. The buying activity must be able to support the sampling technique or approach. The buying activity's rationale should identify the business risks of using the sampling technique and what was done to mitigate those risks.

(C) **Computer model.** 5-337 and the DLA Office of Operations Research and Resource Analysis (DORRA) have developed an adaptation of the On-Demand Manufacturing (ODM) Neural Network to identify hardware items having a very high or very low probability of being commercial. This adapted computer model can be made available for use as a market research tool and is especially useful for reviewing extremely large populations of items. Interested persons can contact anne_barloigh8hq.dla.mil, J-336, for further information and for detailed guidance on how to properly apply the model.

(a)(3)(i7) (90) The contracting officer, not the offeror or contractor, has the authority to determine what constitutes customary commercial practice for the item or service being acquired. The contracting officer may consider a requirement in an agency solicitation to be consistent with customary commercial practice when market research indicates it is at least sometimes used in the commercial marketplace for items or services that are the same as or similar to the ones being acquired by the agency. A business practice does not have to be used by the majority of trading partners in an industry to be considered customary commercial practice. If even one company in a market has repetitively used a particular practice with a significant number of trading partners in that market, the contracting officer can consider that practice to be a customary commercial practice.

(91) To meet the market research standard affirmed by the Comptroller General (see 10.001(a)(2)(90)), buying activities must ensure that any solicitation requirement that may be inconsistent with commercial practice is specifically discussed at a preproposal conference; highlighted by a notice in the solicitation; or otherwise identified to prospective offerors in a manner that generates a "meaningful exchange of information." The GAO has found that -

(A) When conducting an acquisition under FAR Part 12, buying activities cannot rely on the fact that industry representatives have not objected to a solicitation requirement as an indication that the requirement is consistent with customary commercial practice. Silence from prospective contractors is not an acceptable substitute for the agency's obligation to conduct appropriate market research to confirm customary industry practice concerning a proposed solicitation term.

(B) If a buying activity includes a requirement in a solicitation and subsequently determines it is not consistent with customary commercial practice, the buying activity must either remove the requirement (see FAR 15.206) or execute approval of a waiver pursuant to FAR 12.302(c). The FAR does not prohibit granting a waiver following the issuance of the solicitation.

(92) Contracting officers may use an incremental approach to determining the level of market research that is appropriate for the particular acquisition. When it is not cost effective to conduct an extensive amount of market research to determine what commercial practices are available that could potentially replace Government requirements, contracting officers should include previous solicitation requirements, to ensure that the Government's needs are met. These requirements could include, for example, in-process inspection, special packaging, or Government marking. If offerors challenge a solicitation requirement, the contracting officer must research it more extensively at that time, but still only to the extent appropriate to the circumstances. For more complex buys when it is appropriate to conduct more extensive market research, contracting officers may identify to prospective offerors those solicitation requirements (1) with previously existing blanket waivers or other regulatory authorization; (2) that the contracting officer has identified as consistent with customary commercial practice for the item or service being acquired; and (3) that the contracting officer has identified as inconsistent with customary commercial practice and for which a waiver has been obtained. Contracting officers should then solicit industry input, revise the solicitation as appropriate, and obtain additional waivers when needed. When market research appropriate to the circumstances has not indicated a solicitation or contract requirement is inconsistent with customary commercial practice, the contracting officer may elect, at his or her discretion, to obtain a waiver documenting the need for the requirement, in the event it is later determined to be inconsistent with customary commercial practice. To support their market research, buying activities must maintain documentation appropriate to the size and complexity of the acquisition.

* * * * *

SUBPART 12.2 - SPECIAL REQUIREMENTS FOR THE ACQUISITION OF COMMERCIAL ITEMS.

* * * * *

12.208 Contract quality assurance.

(90) Reliance on contractors' quality assurance systems is preferred. However, other quality assurance practices (such as in-process, in-plant inspection for critical application or complex items) are considered consistent with customary commercial practice when market research indicates they are at least sometimes used in the industry for items that are the same as or similar to the ones being acquired (*see* **10.001(a)(3)(iv)(90)**). When Government inspection and testing before tender for acceptance are determined necessary and cannot be considered consistent with customary commercial practices, the contracting officer may request a waiver in accordance with FAR and DLAD 12.302(c). *When the Government needs to inspect before tender or deviate in any other way from FAR 52.212-4(a), Inspection/Acceptance, the contracting officer must tailor the solicitation/contract by attaching an addendum (see FAR 12.302(d)). If the tailoring invokes contract terms and conditions that are consistent with customary commercial practice, a waiver is not required in accordance with FAR 12.302(c). However, an addendum is still necessary to change the terms of the solicitation/contract. If FAR 52.212-4 is incorporated in the solicitation or contract reference with no addendum, the Government has only the rights explicitly stated in FAR 52.212-4(a) as written.*

* * * * *

SUBPART 12.3 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(b)(2)(90) * * *

(e) Discretionary use of FAR provisions and clauses. *Pursuant to FAR 12.301 and 12.302, contracting officers must use their authority to tailor the standard FAR Part 12 terms and conditions as necessary to meet the Government's needs. (For example, a catalog or market price generally includes the cost of liability or similar insurance; therefore, a contracting officer should negotiate an appropriate reduction in the catalog or market price, or tailor FAR 52.212-4(p), Limitation of liability, so the contractor is not relieved from consequential damages (see FAR 46.803). Also see DLAD 12.208(90) concerning how to tailor FAR 52.212-4(a), Inspection/Acceptance.) Subject to the procedures in FAR and DLAD 12.302, the contracting officer may --*

(90)-(91) * * *

(f) The DLA SPE has approved supplementation of the provisions and clauses in FAR Part 12 to require use of the following provisions and clauses, when applicable:

(90) 52.217-9006, *Limitations on Surge and Sustainment (S&S) Investments, as prescribed in 17.9308(a), Solicitation and Contract Clauses.*

(91) 52.212-9000, *Changes - Military Readiness, as prescribed in 12.302(b)(3)(91).*

(92) *The provisions and clauses below, as prescribed in FAR 16.203-4(a), 16.506(a)-(f), and 17.208(c)(1). (Alternatively, buying activities may develop local provisions and clauses for use in lieu of the standard FAR clauses when appropriate, if the activity meets the requirements in FAR 12.302.) These terms and conditions are necessary to support certain DLA business practices, including long term contracts, prime vendor arrangements, and indefinite delivery contracts.*

(i) FAR 52.216-2, *Economic Price Adjustment - Standard Supplies, or a clause authorized in accordance with DLAD 16.203-3;*

(ii) FAR 52.216-18, *Ordering;*

(iii) FAR 52.216-19, *Order Limitations;*

(iv) FAR 52.216-20, *Definite Quantity;*

(v) FAR 52.216-21, *Requirements;*

(vi) FAR 52.216-22, *Indefinite Quantity;*

(vii) FAR 52.216-27, *Single or Multiple Awards; and*

(viii) FAR 52.217-5, *Evaluation of Options.*

(93) *The provision at FAR 52.215-20, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data, as prescribed in FAR 15.408(1); and the clause at 52.215-21,*

Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data - Modifications, as prescribed in FAR 15.408(m).

(94) The clause at FAR 52.203-3, Gratuities, as prescribed in FAR 3.202.

(95) The provision at DFARS 252.209-7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, as prescribed in DFARS 209.104-70(a).

(96) The provision at DFARS 252.209-7002, Disclosure of Ownership or Control by a Foreign Government, as prescribed in DFARS 209.104-70(b).

* * * * *

12.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(a)-(b) • * *

(c) Tailoring inconsistent with customary commercial practice. Approval authority for waivers under FAR 12.302(c) is delegated to one level above the contracting officer.

(90) Contracting officers must use their authority to tailor the standard FAR Part 12 terms and conditions as necessary to meet the Government's needs (see 12.301(e)).

* * * * *

PART 15

CONTRACTING BY NEGOTIATION

* * * * *

15.408 Solicitation provisions and contract clauses.

(1) Requirements for cost or pricing data or information other than cost or pricing data. *Reserved. (See 12.301(f)(93).)*

(m) Requirements for cost or pricing data or information other than cost or pricing data - Modifications. *Reserved. (See 12.301(f)(93).)*

* * * * *